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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

HAROLD C. FAULKNER,
WILBUR F. MATHEWSON,
MELVIN, FAULKNER, SHEEHAN & WISEMAN,
1101 Balfour Building, San Francisco 4, California,
RALPH N. KLEPS,
Legislative Counsel of the State of California,
A. C. MORRISON,
Deputy Legislative Counsel,
State Capitol, Sacramento, California,
EDMUND G. BROWN,
Attorney General of the State of California,
BERT W. LEVIT,
Chief Deputy Attorney General,
State Building, San Francisco 2, California,
Attorneys for the Petitioners.

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Committee on Un-American Activities, a California Legislative Committee, Jack B. Tenney, Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson, all of which named persons were as of the time concerning which the complaint speaks and at the time of the filing of the complaint duly elected and qualified members (State Senators) of the State Senate of California and members of the above-named Committee, and from Elmer E. Robinson, who was at the time of the filing of the complaint and is now the Mayor of San Francisco, California, a defendant but not a petitioner, damages in the amount of $250,000.00 for alleged violation of respondent's claimed rights under and by virtue of the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A.

Summarizing the complaint, it appears that respondent sued under Sections 43 and 47(3) of Title 8 U.S.C.A. to recover damages for alleged violations of his claimed civil rights. The petitioners, defendants in the complaint filed in the United States District Court, are members of The Senate Fact-Finding Committee on Un-American Activities, a California Legislative Committee, sometimes referred to as "The Tenney Committee of the California State Senate", empowered by a resolution adopted in 1947 to inquire into Un-American activities. The remaining defendant is Mayor Robinson of San Francisco.

The pleading avers: "On January 28, 1949, plaintiff (respondent) circulated a petition entitled: 'A Protest Against a renewed Appropriation for the California Senate Committee on Un-American Ac-

tivities (The Tenney Committee)' among the members of the Legislature of the State of California at the State Capitol in Sacramento. * * * and the purpose of said petition, as also stated therein, was that the California Legislature should not appropriate further funds for The Tenney Committee. While plaintiff (respondent) was engaged in circulating said petition as aforesaid for approximately a period of two (2) hours, a subpoena was served upon him ordering him to appear as a witness at a hearing before The Tenney Committee in Sacramento, California, on the following day, to-wit: January 29, 1949." (R. 4.)

The protest or petition goes on to charge that the Committee had "used" respondent (plaintiff) "as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end." The particulars of the charge contained in the protest are lengthy.

The petition or protest and the subpoena are made parts of the complaint and appear respectively on pages 18 and 22 of the Record.

It is to be noted that pursuant to a requirement of the State Constitution, the Legislature of the State of California adjourned for a period of thirty (30) days, commencing at 3:00 p.m. on January 29, 1949, and, hence, was in recess at the time fixed for respondent's appearance.

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Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONERS.

STATEMENT OF THE CASE.

This case is here on writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment of that Court which reversed a

judgment of the Southern Division of the District Court of the United States for the Northern District of California dismissing the complaint of plaintiff in said Court.

A. Reference to the Official Report of the Opinion of the Court Below.

The opinion of the United States Court of Appeals for the Ninth Circuit will be found in the Record at page 137 and is reported in 183 Fed. 2d, 121.

B. Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U.S.C.A. which in its pertinent language provides:

> "Cases in courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

The date of the judgment of the Court of Appeals herein sought to be reviewed was June 30, 1950. (R. 147.)

C. Concise Statement of the Case.

Summary Statement of the Matter Involved.

The Court of Appeals has reversed the judgment of the District Court, dismissing the action brought by the respondent in so far as it relates to petitioners for the failure of the complaint to state a cause for relief.

The complaint of respondent (R. 3-75) sought to recover from petitioners, The Senate Fact-Finding

It is further to be noted that the complaint alleges no interference with the circularizing of the petition other than the service of the subpoena above referred to. At the time fixed for his appearance in the subpoena (R. 22), respondent appeared with his counsel, J. Francis O'Shea, Assistant Attorney General of the State of California, representing the Attorney General's Office of the State of California, and A. C. Morrison, Deputy Legislative Counsel, representing the Office of Legislative Counsel of the State of California, were also present and advised the Committee during the hearing. Upon being sworn as a witness, respondent gave his name, residence and occupation and then stated to the Committee that he was represented by counsel and would like to act under his advice. Counsel for respondent then commenced to read, and later filed with the Committee, the so-called "* * * protest against a renewed appropriation for the California Senate Committee on Un-American Activities * * *" (R. 29). Next counsel for respondent stated objections to the Committee.

One of the grounds of objection was that "* * * the purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation." Other grounds were that respondent had been subpoenaed because of the charges made in his petition to the Legislature; that the Committee was not and could not be a fair and impartial tribunal; that it was engaged in a political and not a legislative investigation in attempting to acquit itself of respondent's charges; that a joint com-

mittee of the Assembly and Senate was the only proper body to investigate such charges; and that the Committee had itself vouched for respondent's veracity by releases and reports in the past. The objections were overruled by the Chairman, but respondent was instructed by his counsel not to respond to questioning. The Chairman then inquired of respondent, "Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?"; to which the answer was, "On advice of Counsel, I will not, no, sir." (R. 30-32.)

The witness thereupon answered questions relating to his signature to the so-called protest. Respondent was then asked, "Q. Do you now and will you continue to refuse to answer each and every question which may be asked of you at this hearing on those grounds?" "A. I refuse to answer any and all questions on advice of counsel." (R. 38.) The respondent then was further and at length interrogated in connection with whether he knew or was acquainted with certain people, including R. E. Combs and Franck Havenner, two of the persons mentioned in his petition. (R. 19.) To all of these questions the witness refused to answer. A motion was made to hold the witness in contempt. Thereupon the Chairman of the Committee referred to an affidavit of respondent of December 9, 1946, which appeared in the Committee's 1947 report, in which affidavit respondent, among other things, admits being a former member of the Communist Party, and specifically that he was induced to become a member of the Communist Party by Frank McCormick and

Hugh Bryson in San Francisco, and after joining the Communist Party he carried out Communist activities. Reference was made to other activities of respondent in connection with evidence presented to the Committee. The Chairman thereupon stated for the record that Brandhove had a criminal record, in the course of which he recounted crimes with which he said respondent had been charged in various cities over a period ranging from 1930 to 1947, including, among other things, charges of sodomy, grand theft, burglary, malicious mischief, and defrauding an inn-keeper. This statement is alleged in the complaint to have been false.

Reference was then made by the Chairman to other affidavits made by respondent and to a newspaper article in which one of the affidavits referred to by the Chairman had been characterized by a Mr. Nicholson as "a tissue of lies" (R. 45), and could be so proved.

The respondent was then asked if he was acquainted with Congressman Havenner's secretary. He refused to answer on advice of counsel. He was then asked, "Does the Army Transport Service in San Francisco have a record of your activities?" (R. 45.) Again respondent refused to answer on advice of counsel. The interrogation of respondent was then dropped and the witness was permitted to leave the stand. At the same hearing the Mayor of San Francisco, Robinson, was called and testified at length in repudiation of the charges Brandhove had made against him which appeared in his so-called protest.

After respondent, Brandhove, had left the witness stand, and when the Mayor of San Francisco, Elmer E. Robinson, was called to testify, Mr. Jarvis, the attorney for Mr. Brandhove, the respondent, attempted to interject his views and make objections to the Committee's calling Mayor Robinson as a witness. It was then and not until then that the Committee interrogated Mr. Jarvis as a witness. (R. 47-50.)

During the course of the session the Committee resolved that a complaint be filed in the proper Court charging respondent with a misdemeanor in refusing to answer questions. This course was followed and respondent was later arrested on a warrant based upon a complaint signed by the Chairman and was confined in jail from February 1 to February 15, 1949. A trial of the charge before a jury on March 5, 1949, resulted in a disagreement, and the case was dismissed four days later on motion of the district attorney.

Respondent's complaint pieces together these proceedings and incidents, plus the sending by the Committee of two telegrams to the district attorneys of San Francisco and Alameda counties. They refer to Brandhove's charges circulated among the legislators and to sworn testimony of Brandhove earlier given before the Committee, said in the telegrams to be inconsistent or at variance with the charges. The officials addressed are urged to charge Brandhove with perjury or to have the matter presented to the grand jury of their respective counties.

The pleading then alleges (R. 8) that respondent had committed no public offense at said Committee hearing on the grounds that the resolution creating the Tenney Committee if read into a criminal statute is in violation of the 14th Amendment of the Constitution of the United States for want of certainty; that said hearing on January 29, 1949, was not held for a legislative purpose; that said hearing was held for the purpose of suppressing the free exercise of constitutional rights of respondent, to-wit, his rights of free speech and to petition the Legislature freely for redress of grievances; that the conduct of said hearing was in violation of due process of law in that the purpose or object of said hearing was not disclosed to respondent, and in that said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and as also expressly required under the resolution creating the Tenney Committee; that the questions asked of respondent at said hearing were not material and proper as required by Section 9413 of the California Government Code.

The pleading goes on to allege that the acts of petitioners above set forth were done or participated in by said petitioners with malice and intent to intimidate and silence respondent and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of

of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, prevent and deprive respondent.

The complaint then charges that the acts of these petitioners were done under color of the authority conferred upon them by the Constitution of the State of California and the California Senate resolution adopted thereunder creating said Committee.

Allegations in respect to damages, actual and punitive, claimed in the sum of $250,000.00 conclude the complaint.

(Note: We are indebted to the opinion of the Circuit Court of Appeals in a large part for the present summarization of the complaint.)

REFERENCE TO RELEVANT PROVISIONS OF CALIFORNIA STATUTORY AND CASE LAW.

No serious claim is made by respondent that the resolution creating The Senate Fact-Finding Committee on Un-American Activities is unconstitutional. The resolution appears in the Record at page 12. The question of unconstitutionality of this resolution was presented to the Court in the case of *Vern Smith v. The People of the State of California*, 336 U.S. 957. The Court decided:

> "Appeal from the Superior Court in and for the County of Alameda, State of California.
>
> * * * * * * *

April 25, 1949. PER CURIAM: The appeal is dismissed for want of a substantial federal question."

Further, the Supreme Court of the State of California, upon an attack by respondent, after his arrest as set forth in his complaint, on the constitutionality of the resolution creating the Tenney Committee, ruled against respondent on this subject by denying his application for a writ of habeas corpus. (See minutes of Supreme Court of California, February 14, 1949, 33 A.C. 454.)

Article IV, Section 2, of the Constitution of the State of California, relating to meetings of the legislature of that state, provides, among other things, that:

> "All general sessions shall commence at 12 o'clock m., on the first Monday after the first day of January and shall continue for a period not exceeding 30 days thereafter; whereupon a recess of both Houses must be taken for not less than 30 days."

The following concurrent resolution was adopted by the State Senate of California:

> "SENATE CONCURRENT RESOLUTION No. 26
> CHAPTER 76
>
> Senate Concurrent Resolution No. 26—Relative to adjournment of the Legislature for the constitutional recess, and to the reassembling of the

Legislature after said recess, and fixing the date for said adjournment and said reassembling.

(Filed with Secretary of State February 3, 1949.)

WHEREAS, Section 2, of Article IV of the Constitution of this State requires that, after the Legislature has been in session for a period of not exceeding thirty days a recess must be taken by both houses for a period of not less than thirty days, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the 1949 Regular Session of the Legislature of the State of California shall adjourn for said recess at 3 o'clock p.m. on the twenty-ninth day of January, 1949, and shall reassemble at 12 o'clock m. on March 7, 1949."

At the time of the occurrence of the events alleged in the complaint, the Government Code of California then and for some time prior thereto had and does now provide as follows:

"9401. A subpoena requiring the attendance of any witness before the Senate, Assembly, or a committee may be issued by the President of the Senate, Speaker of the House, or the chairman of any committee before whom the attendance of the witness is desired."

"9402. A subpoena is sufficient if it:

(a) States whether the proceeding is before the Senate, Assembly, or a committee.

(b) Is addressed to the witness.

(c) Requires the attendance of the witness at a time and place certain.

(d) Is signed by the President of the Senate, Speaker of the Assembly, or chairman of the committee before whom attendance of the witness is desired."

"9405. If any witness neglects or refuses to obey a subpoena, or appearing, neglects or refuses to testify, or to produce upon reasonable notice any material and proper books, papers or documents in his possession or under his control, he has committed a contempt."

"9410. A person sworn and examined before the Senate or Assembly, or any committee, cannot be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify. Any statement made or paper produced by such witness is not competent evidence in any criminal proceeding against the witness. The witness can not refuse to testify to any fact or to produce any paper touching which he is examined for the reason that his testimony or the production of the paper may tend to disgrace him or render him infamous. Nothing in this section exempts any witness from prosecution and punishment for perjury committed by him on examination."

"9412. Every person who, being summoned to attend as witness before the Senate, Assembly, or any committee, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before the Senate, Assembly, or any committee, wilfully refuses to be sworn, to answer any material and

proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control is guilty of a misdemeanor.

Every member of the Legislature convicted of a misdemeanor under this section, in addition to the punishment prescribed, forfeits his office and is forever disqualified from holding any office in the State."

It is the law of California that a legislative committee can, with complete propriety, inquire into any subject matter which arises impugning its own integrity. (*Ex parte McCarthy*, 29 Cal. 395.) The respondent, as a witness before the Committee, had no right to be represented by counsel, for such right of a witness at a legislative inquiry is a matter of grace, not of right. (*Ex parte McCarthy*, 29 Cal. 395, 402.)

Under the law of California, a witness may not be compelled before a legislative committee to answer questions propounded by it to the witness unless the investigation was so far legislative in character as to have empowered the committee to ask to have answered the questions propounded.

In re Battelle, 207 Cal. 227, 257.

We can say without fear of contradiction the statutory and case law of California is zealous in safeguarding the rights of witnesses before legislative committees.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals erred in reversing the judgment of the District Court.

2. The Court of Appeals erred in holding that the complaint stated a claim for relief under the provisions of Sections 43 and 47(3) of Title 8, U.S.C.A.

3. The Court of Appeals erred in holding that the judiciary may inquire in the motives of the Legislature of the State of California and of its committees while acting in the discharge of their duties as such.

4. The Court of Appeals erred in holding that acts of a legislative committee of the Legisla re of the State of California, lawful in and of themselves, when tested by the laws of the State of California and of the United States, may constitute an abuse of power because of the motives of the members of the committee.

5. The Court of Appeals erred in holding that the conduct of the petitioners deprived respondent of a federally protected right.

6. The Court of Appeals erred in holding that the provisions of Sections 43 and 47(3) of Title 8, U.S. C.A., applied to the official acts of the legislative committee of a state legislature.

7. The Court of Appeals erred in holding that the circulation of a petition by a citizen of the State of California among members of the Legislature of the State of California seeking to induce the legislators not to appropriate funds for a legislative committee

was a right, privilege or immunity secured to the citizen of the State by the Constitution and laws of the United States.

8. The Court of Appeals erred in holding in effect that the complaint charges that the respondent was deprived of a right, privilege or immunity secured to him by the Constitution and laws of the United States, when the right, privilege or immunity, if existent theretofore, admittedly had been exercised by respondent.

ARGUMENT.

I.

SUMMARY OF ARGUMENT.

The sequence of our argument has no relation to the importance of one subject over another.

A.

Under the heading of "Legal Questions Presented", we urge to the Court that the right to petition the California State Legislature is not a right secured under the Fourteenth Amendment but is rather a right existing between a citizen of the state and his own state government. Preserving the sovereignty of the state is a matter as essentially important as any other subject which may come to the Court for review.

B.

We urge to the Court that legislators are immune from civil liability for their actions in discharge of

their public duty. This immunity is part of constitutional government and is a right existing in the legislators and in the people. The people are entitled, under a republican form of government, to have legislators answerable only to them for the manner in which they discharge their public duty. We urge that it was never the intention of the people in the ratification of the Fourteenth Amendment to impliedly repeal this right. Certainly, the enactment of the Bill of Rights did not repeal the fundamental right of congressmen to immunity from civil liability for acts performed in discharge of their public office.

C.

In a republican form of government constitutionally providing for the equal division of power, there exists no power in the judiciary to review the intent which prompts a member of the Legislature to act in the discharge of his office and trust. This principle has been continuously observed and has been particularly recognized by the Courts of the United States in numerous decisions in the last few years.

D.

A decision which holds, as does that of the Court of Appeals in the instant case, that the Civil Rights Act gives a cause of action on the theory that punishment for having exercised a constitutional right is the equivalent of deprivation of the right is an erroneous construction of Section 43, Title 8, U.S.C.A. The Congress, at the time of enacting this section, had very clearly in mind the matter of punishment for

having exercised a federally protected right, and its omission from Section 43 must be deemed intentional.

The pleading and the facts clearly existent here do not show punishment or reprisal within the meaning of the law. The respondent here exercised his constitutional right. After exercising it, all that happened was that he was subpoenaed to appear as a witness, and from then on a lawful hearing was had and there was put in motion the due processes of law of the State of California. The processes of law put in motion were not oppressive but were the ordinary processes of law which would have been put in motion in respect to any person who had conducted himself in the manner in which respondent conducted himself at the hearing before the Legislative Committee.

II.

ANALYSIS OF COMPLAINT.

It is essential to analyze the facts pleaded for the purpose of determining:

(A) The rights which respondent claims he was deprived of;

(B) The manner in which respondent claims he was deprived of rights or a right; and

(C) Has the respondent pleaded a cause of action for reprisal for having exercised a constitutional right.

(A) The rights which respondent claims he was deprived of.

The complaint, paragraph 13 (R. 10), contains an allegation that the acts of defendants above set forth were done or participated in by said defendants with malice and intent to deter and prevent him from effectively exercising his constitutional rights, namely:

(1) the right of free speech;

(2) the right to petition the legislature for redress of grievances;

(3) the equal protection of the laws;

(4) due process of law; and

(5) the enjoyment of equal privileges and immunities of a citizen of the United States under the law.

In respect to equal protection of the laws, it is quite clear that a violation of this right did not arise in connection with the manner, facts, or circumstances under which respondent circulated his petition; nor did it arise in connection with the service upon him of the process (subpoena) of the State of California, which conformed to the regular, orderly and statutory laws on the subject of subpoenaing a witness before a legislative committee; nor did it arise in connection with the hearing before the Committee.

Until the respondent became a difficult and contumacious witness, he was treated with respect and his counsel was treated with consideration. He became at the very outset a contumacious witness. The situation which developed before the Committee was engendered and brought about by respondent's own conduct. The

subsequent determination by the Committee to charge him with the offense which, it would appear, he clearly committed in its presence is not nor is it alleged to be different treatment from that the State Legislature, acting through a committee, would follow in respect to any other witness similarly conducting himself.

All that the Committee did was to set in motion the orderly processes of the state government of California under which the witness would be punished only if he were guilty of a violation of the statutory law in respect to the conduct of the Committee (Sections 9405 and 9412, Government Code of California, supra), and under which every legal right which he may have had before the Committee was protected under the law.

Further allegations in the complaint in respect to the manner in which the hearing was conducted have little significance when applied to a legislative committee hearing at which no judgment, order or any other edict of the committee could in any way affect the property or liberty of the witness.

In this connection it is well to remember that a legislative committee hearing is not an adversary proceeding, and that the only thing it can affect is the proposal, passage or defeat of legislation.

Plaintiff's complaint, paragraphs 7 and 8 (R. 6 and 7), among other things, alleges that the purpose and object of the hearing of the Tenney Committee was "* * * to the end that said committee should

obtain the appropriation of funds requested from the California Legislature."

In conducting said hearing the Legislature is not to be restricted by the fact that methods and processes generally employed in judicial or quasi-judicial proceedings are used.

In re Battelle, supra;
McGrain v. Daugherty, 273 U.S. 135.

Article IV, Section 1, of the Constitution of California, provides:

> "The legislative power of this State shall be vested in a Senate and Assembly, which shall be designated 'The Legislature of the State of California,' * * *"

Article IV, Section 9, of the Constitution of California, provides:

> "Each House shall determine the rule of its proceeding, * * *"

A consideration of the complaint, with the foregoing points in mind effectively disposes of the conclusion of respondent that he was deprived of equal protection of the law, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States, except insofar as either may relate to the right of free speech and the right to petition the Legislature for the redress of grievances.

The foregoing is completely consistent with the view expressed by the Circuit Court in the instant case and in the cases of:

Barsky v. United States, 167 F. (2d) 241;
Dennis v. United States, 171 F. (2d) 986;
Eisler v. United States, 170 F. (2d) 273;
United States v. Josephson, 165 F. (2d) 82.

It is obvious that the loosely used phrases, "equal privileges and immunities," and "the equal protection of the law," were inserted in the complaint because Section 47(3) Title 8 U.S.C.A. has similar language. Section 47(3) Title 8 U.S.C.A. provides as follows:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or prop-

> erty, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

We have pointed out above that there are no facts alleged in the complaint, nor any substantive allegations, which bring the case within the provisions of said Section 47(3). The Courts of the United States have consistently distinguished between the right of action conferred under Section 43 and the right of action under Section 47(3).

See:

Mitchell v. Greenough, 100 F. (2d) 184;
McShane v. Moldovan, 172 F. (2d) 1016;
Snowden v. Hughes, 321 U.S. 1.

(B) The manner in which respondent claims he was deprived of rights or a right.

The Circuit Court, in its decision in the instant case, holds that the defendants did not prevent respondent from exercising the right which the Court declared he had. It is clearly true that if any constitutional right of respondent is involved in this case, he did exercise it.

The respondent, however, in his complaint makes certain claims. Stripped of superfluous language, the complaint alleges that a series of acts of defendants deprived him of the right of free speech and the right

to petition the Legislature for redress of grievances by fear induced by:

(1) the service of a subpoena;

(2) the holding of an allegedly unfair hearing in the course of which he was allegedly denied procedural due process; and

(3) the determination by the Committee to file a complaint charging him with violation of Section 9412 of the Government Code.

It will appear in our treatment of Subdivision (A) above that the manner in which respondent claims he was deprived of his constitutional rights does not show a deprivation of any constitutional right at all.

(C) Has the respondent pleaded a cause of action for reprisal for having exercised a constitutional right.

It is clear from the complaint that the respondent's cause of action is based, as pleaded, upon the claim that the series of acts alleged to have been committed by the defendants were acts which *deprived* him of constitutional rights.

In his conclusions, as distinguished from facts, he charges defendants with conduct done for the purpose of intimidating and silencing him and deterring and preventing him from exercising his constitutional rights.

The conclusions in the complaint are inconsistent with the pleaded facts which show the right of respondent, which he claims was a constitutional right, was exercised.

The theory of deprivation of a constitutional right by reprisal, after the right has been exercised, has been interjected into this case by the decision of the Court of Appeals.

III.

LEGAL QUESTIONS PRESENTED.

A.

THE RIGHT TO PETITION THE CALIFORNIA LEGISLATURE IS NOT SECURED TO THE RESPONDENT BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

1. The facts pleaded disclose that if any constitutional right of the respondent was involved, it was the right to petition the legislature.

Regardless of the language contained in the complaint, it appears without question that the respondent was engaged in the act of circulating among the Legislators of the State of California a petition containing a protest highly critical of the members of the Legislature and petitioning the members that they do not appropriate further money for the Committee. Respondent did not circulate his petition among members of the public; nor did he make any attempt to do so; nor did he allege any intention of doing so. Respondent did not address, nor attempt to address any group of Legislators or public or private group, nor did he allege that he attempted so to do or that he had the intention of so doing. He was engaged in the single act of petitioning the Legislators of the State of California in reference to a matter pending

before that body, namely, the appropriation by the Legislature of state funds for state purposes.

There exists under constitutional government the right in the citizen to petition for the redress of grievances. It is a right distinct and separate from freedom of speech and the right to assemble, both of which exist in the individual.

It will be observed that the right of freedom of speech and the right to petition the government for the redress of grievances are expressed in different clauses of the First Amendment to the Constitution of the United States and different sections of the Constitution of the State of California.

The First Amendment to the Constitution of the United States provides:

> "Article I.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Sec. 9 of the Constitution of the State of California provides:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

Article I, Sec. 10 of the Constitution of the State of California provides:

"The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances.'".

2. The right to petition the California legislature is not secured to the respondent by the Constitution or laws of the United States.

Although the right to petition the government is a fundamental one, it is a right limited to the citizen. It is a fundamental right not conferred by either the Constitution of the United States or of the State of California, but rather secured to the citizens of each sovereign by the constitution thereof. It is to be observed that the fundamental rights of freedom of religion, freedom of speech, or of the press; and the right to assemble peaceably, are rights within the man himself, unrelated to place, time, or a particular person or political body. The right to petition the government for redress of grievances arises from the relationship of the citizen and his government. Clearly, a citizen of the United States has the right to petition his government, and, with equal clarity, it appears that the Fourteenth Amendment, having in mind the construction placed upon it by the Supreme Court of the United States, prevents any State from depriving a person of that right.

We do not have here any action under the color of State authority abridging or in any manner interfering with the right of a citizen of the United States to petition his government.

The State of California has protected its citizens by enacting into its Constitution the right to petition

its Legislature. The right to petition the Legislature of the State of California is a matter of state concern exclusively. Just as the Fourteenth Amendment prevents persons acting under color of State authority from interfering with the right of the citizen of the United States to petition his government, so does the Tenth Amendment reserve the power in the State or its people in respect to the subject matter of petitioning its Legislature. The Tenth Amendment provides:

> ARTICLE X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is to be observed that the right to petition the federal government for redress of grievances has been the subject matter of discussion in the Congress in the early days of our Republic, and the Court will have in mind that Congress in its early days was deluged with petitions from Abolitionists. Prior to that time Congress had a practice of, at regular intervals, having members bring to the attention of the Congress matters of grievances coming from the people. These grievances were made a part of the record. Because of the overwhelming number of these petitions, the Congress over the protest of some States, tabled all of them without action and without printing them in the Congressional Record or at all. (See Congressional Debates relating to Atherton's Resolution of December 12, 1838, Congressional Globe, 25th Congress, 3rd Session, Vol. VII.)

If Congress passed a statute relating to the form and manner and procedure to be employed in peti-

tioning for the redress of grievances against the government, would the State of California be bound to follow it in respect to action by its citizens under its State Constitution? If the State passed a law relating to the form and manner and procedure to be employed in petitioning the Legislature of the State for redress of grievances, is it within the jurisdiction of a Federal Court to declare it a nullity? Reason dictates that the rights are separate and apart.

There still exists a distinction between the State and Federal government. Little distinction will remain if Congress can legislate upon the subject of the manner of how the State handles the right of its citizens to petition its Legislature.

Cases which have a bearing on this subject and which sustain the views here expressed are:

United States v. Cruikshank, 92 U.S. 542, 552;
Crandall v. State of Nevada, 73 U.S. 35, 44.

It will be observed in the case of *Hardyman, et al., v. Collins*, 183 F. (2d) 308, certiorari granted in your Court, that the pleader in that case was very explicit to claim that the subject matter of the meeting related to federal questions. It is respectfully submitted that the right to petition the State Legislature is not one of the rights set out in the Bill of Rights; further, the due process clause of the Fourteenth Amendment did not require the State to give to its citizens all the rights secured to the citizen of the United States by the Bill of Rights. These rights are many; here are a few:

Right to trial by jury in a State Court.

Maxwell v. Dow, 176 U.S. 581.

Freedom from unreasonable searches and seizures.

(a) This inclusion is debatable under the decision in

Wolf v. People of the State of Colorado, 338 U.S. 25.

Right to indictment by Grand Jury.

Maxwell v. Dow, supra.

Prohibition against self-incrimination.

Adamson v. People of State of California, 332 U.S. 46.

Right to be charged by indictment in felony cases.

Hurtado v. People of State of California, 110 U.S. 516.

The political relation between the State and its citizens is free from federal interference. Such freedom is essential in preserving the balance between the national and state power. As stated in the *Adamson* case, supra, at pages 51 and 53:

> "The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672; Feldman v. United States, 322 U.S. 487, 490, 64 S. Ct. 1082, 1283, 88 L. Ed. 1408, 154 A.L.R. 982. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal pro-

tection for their elemental privileges and immuni
ties of state citizenship. The Slaughter-Hous
Cases decided, contrary to the suggestion tha
these rights, as privileges and immunities of stat
citizenship, remained under the sole protection o
the state governments. This Court, without th
expression of a contrary view upon that phase o
the issues before the Court, has approved thi
determination. Maxwell v. Bugbee, 250 U.S. 525
537, 40 S. Ct. 2, 5, 63 L. Ed., 1124; Hamilton v
Regents, 293 U.S. 245, 261, 55 S. Ct. 197, 203, 7
L. Ed. 343. The power to free defendants i
state trials from self-incrimination was specifi
cally determined to be beyond the scope of th
privileges and immunities clause of the Four
teenth Amendment in Twining v. New Jersey, 21
U.S. 78, 91-98, 29 S. Ct. 14, 16-19, 53 L. Ed. 97
'The privilege against self-incrimination may b
withdrawn and the accused put upon the stand a
a witness for the state.' The Twining case like
wise disposed of the contention that freedom from
testimonial compulsion, being specifically granted
by the Bill of Rights, is a federal privilege o
immunity that is protected by the Fourteenth
Amendment against state invasion. This Cour
held that the inclusion in the Bill of Rights o
this protection against the power of the nationa
government did not make the privilege a federa
privilege or immunity secured to citizens by th
Constitution against state action. Twining v. New
Jersey, supra, 211 U.S. at pages 98, 99, 29 S. Ct
at page 19, 53 L. Ed. 97; Palko v. Connecticut
supra, 302 U.S. at page 328, 58 S. Ct. at page 153
82 L. Ed. 288. After declaring that state and
national citizenship co-existed in the same person

the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power."

Except as limited by the Fifteenth Amendment the State has complete power over suffrage. As stated in *Guinn v. United States*, 238 U.S. 347:

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In

fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

Cf. *Breedlove v. Suttles*, 302 U.S. 277.

The cases dealing with national as contrasted with State elections should not be confused. Those involve an entirely different principle, namely, that the federal government has exclusive control, should it choose to exercise it, over the relation between the federal government and its citizens which it may protect from state interference.

Likewise the right to become a candidate for a state office is a right or privilege of state, not national, citizenship, and is not secured to a person by the Constitution of the United States.

Snowden v. Hughes, 321 U.S. 1.

It necessarily follows that the right involved in the present pleading being the right to petition the State Legislature, the respondent stated no cause or claim for relief. The right claimed violated was his right as a citizen of the State of California in relation to his state government. That right is not conferred upon him by the United States Constitution, nor guaranteed to him by the Fourteenth Amendment. Therefore, Congress could not, and has not, in Sections 43 and 47(3), Title 8, U.S.C.A., created a cause of action against a state officer for violating that right.

B.

THE LEGISLATORS OF THE STATE OF CALIFORNIA ARE IMMUNE FROM CIVIL LIABILITY.

Article IV, Section 4, of the Constitution of the United States provides, among other things, as follows:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, * * *"

We respectfully submit that there is squarely presented to the Court in this case the question of whether the duly elected members of a State Legislature are immune from civil liability for acts done or performed and statements made in the discharge of their duties.

We dismiss as untenable any claim that the facts alleged in relation to a member or members of the Committee sending telegrams to district attorneys suggesting the prosecution of the respondent for perjury and the act of a member of the Committee in holding a claimed conversation with the Mayor of San Francisco are acts which could possibly give rise to a cause of action under the Civil Rights Act; this, whether they are considered as isolated acts or are considered in connection with other pleaded facts. We are concerned here in the pleaded facts with a case which brings under scrutiny a hearing lawfully held for a lawful purpose and pursuant to constitutional authority of the State of California.

It is to be observed that the people formed a constitutional government, denominated a "republican"

form of government. The people forming the government reserved unto themselves certain fundamental rights which continued to exist in them after the adoption of a constitution which was a delegation of power and after the adoption of the Bill of Rights containing a limitation on the power of the government.

The constitutional government formed followed a known historical pattern of division of power between the executive, judicial, and legislative branches of the government. At the time of the formation of this government there was inherent a known immunity of legislators under constitutional government from civil liability arising from the performance of their duties. The basis of the immunity was to preserve the object that legislators should be answerable only to the people. This immunity from civil liability was recognized and approved by the Supreme Court of the United States in the case of *Kilbourn v. Thompson,* 103 U.S. 168, long after the adoption of the Bill of Rights. That immunity has continued to cloak the Congress of the United States. The immunity expressed in the Constitution merely declares a right which the Congress already had. As pointed out in *Kilbourn v. Thompson,* which will be hereafter discussed, the legislature of a State had a like immunity.

Later in our history, the Fourteenth Amendment was adopted. On its face there is not the slightest indication that it intended to impair or affect the right in the people to have their legislative repre-

sentative responsible to others than to them. At the time of the adoption of the Fourteenth Amendment there did not exist any body of law which held that a Congressman or Legislator was subject to civil liability for acts done in the discharge of his duty. The law appears to be to the contrary. Thus, the people, governed under the form of government which they established, possess fundamental rights which are in whole or in part described in the Constitution. Three of these rights are, freedom of speech, the right to petition their government for the redress of grievances, and the right to elect legislators answerable to them alone.

The relative importance of these respective rights will vary depending upon the individual who considers them. The fact is, however, that for one hundred and fifty years we have done well in the operation of our governments where the claim of civil liability of legislators for acts performed pursuant to their power and under their duty has not been sustained. How well we will do if the acts of legislators in the performance of these duties are to subject them to civil liability we trust we will never have to consider. Even the person who petitions the legislature for redress of grievances is entitled to have his grievances heard by a legislature answerable only to the people and immune from being held accountable in Court for its actions in discharge of its duty.

We see no distinction between a state legislator and a federal congressman. We see no distinction between

a claim of civil liability against a State Un-American Activities Committee and the Un-American Activities Committee of the House of Representatives.

If the adoption of the first ten amendments did not repeal by implication the immunity from civil liability of congressmen, it is difficult to see how it would be possible to have an implied repeal of civil liability of state legislators flow from Section 1 of the Fourteenth Amendment.

On this interesting subject the language of Justice Field in *Ex parte Virginia*, 100 U.S. 339, 362, is enlightening:

> "To every State, as understood in the American sense, there must be, with reference to the subjects over which it has jurisdiction, absolute freedom from all external interference in the exercise of its legislative, judicial, and executive authority. Congress could not undertake to prescribe the duties of a State legislature and the rules it should follow, and the motives by which it should be governed, and authorize criminal prosecutions against the members if its directions were disregarded; for the independence of the legislature is essential to the independence and autonomy of the State."

The language on page 203 of *Kilbourn v. Thompson*, supra, referring to the privilege of civil immunity, is applicable:

> " 'These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the

rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.'

* * * * * * *

"Mr. Justice Story (sec. 866 of his Commentaries on the Constitution) says: 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as matter of constitutional right.' "

Additional cases on this subject are:

Collins v. Riley, 24 Cal. (2d) 912, 915;
Ex parte McCarthy, 29 Cal. 395;
Hearst v. Black, 87 F. (2d) 68;
United States v. Bryan, 72 F. Supp. 58;
Cochran v. Couzens, 42 F. (2d) 783;
Spalding v. Vilas, 161 U.S. 483.

Let us face the issue squarely. The Congress of the United States and the Legislators of the States are now and for some time past have been concerned with subversive elements and militant minorities. It is for the Court to say here whether under our form of government it is the intention of the people, in whom all rights are reserved, that their legislators shall perform their public duty in an atmosphere of apprehension, which would necessarily result if the claimed aggrieved can sustain an action such as this under the Civil Rights Act. This is a matter of great concern

to the legislature of the State of California. No issue presented in this case overshadows the right of the people to elect and have act for them legislators who are answerable only to them.

It is wrong from the viewpoint of the people that a legislator be influenced in his duty by money given to him (bribery); it is equally wrong that a legislator should be influenced by the fear that money should be taken away from him.

It is interesting to note that this Court considered it very doubtful whether action taken under the constitution of a state is actionable under the precise language of Section 43, Title 8, U.S.C.A. (See *Giles v. Harris*, 189 U.S. 475.)

Consistent with the above reasoning and pointing to the fact of the importance of the subject, we refer to the Court for attention the language of Judge Rutledge in *Screws v. United States*, 325 U.S. 91, at 127:

> "More rarely they have touched other matters, such as the limiting effect of official privilege and, in occasional instances, mens rea."

In support of this observation reference is made to *United States v. Chaplin*, 54 F. Supp. 926, a lengthy opinion relating to the exemption of Courts in discharging their judicial duties. The distinction appears to be that if the judge or legislator is acting in the performance of his official duty as judge or legislator, he has an immunity. We are not pressing the proposition that a judge or a legislator acting beyond the power conferred in him has immunity from civil

liability. So in this case, where it appears on the record that the legislators were acting within their power as legislators, the mere allegation that they acted with malice or intent to deprive a person of a civil right does not bring the basic cause of action within Section 43, Title 8, U.S.C.A. Cf. *Bottone v. Lindsley,* 170 F. (2d) 705.

Here, all of the acts done were pursuant to the Constitution of the State of California, the legislative enactment of the resolution appended to the complaint, and the provisions of the Government Code of California and the Penal Code of California. Does the mere allegation of malice or intent to deprive a person of a constitutional right in an action that is clearly within the provisions of due process in the state take it without the rule of exemption of immunity from civil liability?

C.

THE JUDICIARY HAS NOT THE POWER TO INQUIRE INTO THE MOTIVES OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT WHEN ACTING WITHIN THE SCOPE OF THEIR LEGISLATIVE POWERS.

The Circuit Court, in its opinion, properly declares that the acts of the petitioners as members of the Committee in conducting the committee hearing were lawful. The Court of Appeals declares that the respondent was not deprived of the right which that Court characterizes as the right of freedom of speech. We in turn disagree with that Court in characterizing the right as freedom of speech but earnestly urge

that it was petitioning the legislature for redress of grievances. Regardless of whether the right was freedom of speech or petitioning the Legislature for redress of grievances, the Court of Appeals spells out a claim for relief for the respondent on the basis that although all of the acts were legal and conformed with the constitutional laws of the State of California, that if they were performed with malice and intent to punish and oppress respondent for having exercised his right, a claim for relief is stated.

The Court of Appeals has held, and even if it did not so hold, it still would be apparent from the complaint, that the acts of the petitioners were in performance of their duties and pursuant to the powers within them vested by the State of California by resolution passed by the State Legislature and statutory laws of the State. The decision announced by the Court of Appeals is that the petitioners are subject to a cause of action for damages. Thus a trial Court must determine whether petitioners had in their actions otherwise lawful, a motive to punish the respondent for having exercised his right of free speech or, as contended by petitioners here, the right to petition the Legislature. This decision was reached without the discussion or mention of the basic principle that the Legislature is free from interference by the judiciary. It is respectfully submitted that there can be no claim for relief under the Civil Rights Act which depends upon the existence of motive or intent in the minds of the legislators at the time they performed a legislative act within their power. This

is not a subject into which Courts may inquire. This precise question has been before the Courts of the United States in recent years on numerous occasions. It is true that the cases did not involve the application of the Civil Rights Act. However, the cases did involve the constitutionality of the action of Congressional Committees under attack upon the ground that their action infringed upon the right of individuals secured by the First Amendment to the Constitution. It must be borne in mind that the First Amendment to the Constitution is a clear and unequivocal declaration that Congress shall make no law violating any right included in the present case.

In the cases to be cited the prohibitions of the First Amendment were applied directly, that is, to the direct action of Congress. In this case the prohibitions of the First Amendment are still sought to be applied not directly but by virtue of the provisions first of the Fourteenth Amendment and secondly, of the Civil Rights Act. Thus, the power of the Court to inquire into the motives of the legislative committee is no greater than the power of the Court to inquire into the motives of the Committee created by Congress.

In *Dennis v. United States*, 171 F. (2d) 986, 988, the Court stated:

> "Once the rule has been established that the creation of the Committee was within the constitutional powers of the Congress (as has been well established by the three cases noted supra), it is neither the business nor the prerogative of this court or any other court to pass upon either

the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution."

In the case of *Eisler v. United States*, 170 F. (2d) 273, 278, the Court stated:

"During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appellant was 'to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress' powers.' The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees."

Although the Court did not cite any authority for the propositions quoted above the Court will observe that both the *Dennis* and *Eisler* cases were decided by the United States Court of Appeals, District of Columbia, and in both cases the Court consisted of Associate Justices Clark, Prettyman and Proctor. Previous to the decision of the Court in the *Dennis* and *Eisler* cases the same Court with Associate Justices Clark, Prettyman and Edgerton had decided the case of *Barsky v. United States*, 167 F. (2d) 241, 250, in which case the Court stated:

"Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Emi-

nent persons have stated similar views. But such matters are not for the courts. We so held in *Townsend v. United States*, citing *Hearst v. Black*. The remedy for unseemly conduct, if any, by Committees of Congress is for Congress or for the people; it is political and not judicial.

"It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity, within the respective powers of the legislature and the executive."

In the *Townsend* case cited by the Court (*Townsend v. United States*, 95 F. (2d) 352, 361), the Court stated:

"Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The

orderly processes of legislative inquiry require that the committee shall determine such questions for itself. *Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations.* Hearst v. Black, 66 App. D. C. 313, 87 F. 2d 68. A witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute. Sinclair v. United States, supra, 279 U. S. 263, at page 299, 49 S. Ct. 268, 273, 73 L. Ed. 692. Beyond this, he must conform to the procedure of the committee and respond to its questions. McGrain v. Daugherty, supra, 273 U. S. 135, at pages 175, 176, 47 S. Ct. 319, 329, 71 L. Ed. 580, 50 A. L. R. 1. He cannot be heard to plead justification and, hence, lack of willfulness in defiantly leaving a hearing because he does not like the questions propounded to him —remedy by objection and refusal to answer both being open to him." (Italics added.)

In the case of *Hearst v. Black* (also cited by the Court in the *Barsky* case), 87 F. (2d) 68 at pages 71 and 72, the Court stated:

"The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents

could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. *On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.*

The Constitution has lodged the legislative power exclusively in the Congress. If a Court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. *Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others. 'This separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism.'* Springer v. Philippine Islands, 277 U. S. 189, 201, 48 S. Ct. 480, 482, 72 L. Ed. 845." (Italics added.)

Among the cases relied upon by the Court in the *Hearst* case was the case of *Alpers v. City and County of San Francisco,* 32 Fed. 503, 506 (Circuit Court, Northern District, California, 1887) in which in an opinion by Circuit Justice Field it was stated:

"The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may

tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. *The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends.* Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." (Italics added.)

Another case relied upon by the Court in the *Hearst* case was the case of *New Orleans Water Works v. New Orleans,* 164 U.S. 471, 481, in which it was stated in an opinion by Justice Harlan:

> "If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. *It ought not to attempt to do indirectly what it could not do directly.* In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the State and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption." (Italics added.)

The Court in the *Barsky* case, supra, also relied upon the historical case of *McGrain v. Daugherty,* 273 U.S. 135.

In the latter case, at page 175, the Court clearly held that even the abusive and oppressive use of the power of inquiry by a Congressional Committee af-

fords no ground for denying the power and that the relief to be afforded an individual who is subject to such oppressive and abusive use of the power consists of the right to refuse to answer such questions or the writ of habeas corpus if he is incarcerated for refusing to do so. The Court stated in this connection:

> "The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and In re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

In the *McGrain v. Daugherty* case the Court cited as one of the authorities the case of *Marshall v. Gordon*, 243 U.S. 521, 545, where the Court in determining the extent of the legislative power to punish for contempt in a case which was similar to the one at bar inasmuch as it arose out of an irritating and ill-tempered statement addressed to Congress in a letter, the Court stated with respect to the power of Con-

gress to punish for a contempt for an obstruction of the exercise of the legislative power:

> "And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

The decisions cited and quoted above are founded upon and are applications of the rule prevailing with respect to the legislative enactments, for it has been held without exception that the judiciary cannot inquire into the motives of the legislature in the enactment of legislation.

14 *Am. Jur.* 399;
11 *Am. Jur.* 818;
1 *Cooley's Constitutional Limitations,* 8th Ed. 379.

The following language from the opinion of Chief Justice White in *McCray v. United States,* 195 U.S. 27, 54, is quoted with approval by Cooley, note, page 381:

> "It is * * * argued, if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the govern-

ment may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. * * *

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

The Supreme Court of the United States has not distinguished between Congress and the legislative bodies of the respective states of the Union in refusing to consider the wisdom, need and appropriate-

ness of legislation or the motives of the legislature in the passage of laws.

Olsen v. State of Nebraska, 313 U.S. 236;
Amy v. Watertown, 130 U.S. 301;
Soon Hing v. Crowley, 113 U.S. 703;
New Orleans v. Warner, 175 U.S. 120;
Sonzinsky v. United States, 300 U.S. 506;
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381;
Mulford v. Smith, 307 U.S. 38.

The Court of Appeals for the Ninth Circuit has also followed this general rule in the case of *Allen v. Markham*, 156 F. (2d) 653, 660.

It thus seems to be clearly established that the Federal Courts do not have the power to inquire into the motives of the legislative departments of the Federal or of the State governments. The power of the Court in this case can be no greater than the power of the Court to inquire into the motives of Congressional Committees. The only justification for such inquiry would be the application of the provisions of the First and Fifth Amendments to the Constitution of the United States directly. The Fourteenth Amendment and Civil Rights Acts can do no more than apply the provisions of the First Amendment to the acts of the State. It is apparent from the foregoing authorities that the fundamental requirement of a separation of powers has precluded the inquiry by the judiciary into the motives of the legislative branch of the government.

The *Eisler* case and the *Barsky* case hold flatly that the judicial power may not be used to scrutinize the motives of the committee upon an attack almost identical with the one made here.

The Court of Appeals here has held that the action of a legislative committee, making legitimate use of the power conferred upon it, may become unlawful by scrutinizing and inquiring into the motive actuating the committee in the performance of its acts.

Thus the holding here is in direct conflict with the holding in the cases cited.

The purpose of the investigation of un-American activities of necessity involves freedom of the press, freedom of speech, freedom of assembly. When the speech and the writing and the assemblage of people engaged in un-American activities are hereafter to be the subject matter of an investigation by a lawfully constituted committee, exercising constitutional powers to do such investigating, those investigating may, under the decision of the Court of Appeals in this case, face a claim for damages under the Civil Rights Acts upon the bare declaration that the act committed is in reprisal for having exercised free speech, freedom of the press, and the freedom to assemble and that the act was actuated by malice. The holding of the Court of Appeals that the motives which prompt a legislative body, acting through a committee (but why not the Legislature itself), may be scrutinized by the judicial branch of the government is not within the power of a Court under a republican form of government, with separation of powers. It has been

consistently held that the exercise of constitutional rights by individuals is subject to, and limited by, the right of the people to have the government function.

Incidental to this subject, the holding of the Court of Appeals above discussed completely ignores the fundamental rule in civil law, namely, that well-expressed rule in the following quotation from 54 *C.J.S.* 915:

> "Malice in law exists where a wrongful act is intentionally done without just cause or excuse, but since malice in law is predicated on the doing of an unlawful act or the doing of a lawful act in an unlawful manner, it cannot exist where the thing done is lawful and the means employed are lawful."

It is to be borne in mind that numerous decisions including very recent decisions of your Court have determined the constitutionality of regulations and ordinances passed in various States but your Court has never permitted the test to be the claimed intention of the lawmaking body in adopting the law or regulation. The question has always been whether the regulation or ordinance does or does not deprive a person of a constitutional right. Are we going to interject into every piece of legislation hereafter to be reviewed in this Court coming from state jurisdictions an inquiry into the intent which prompts the enactment of the ordinance otherwise legal? Let us illustrate this proposition further: Assume that X, a person or group of persons of means, engages in a campaign bottomed on vilification of a group of candidates to the legislature. Such an attack may be car-

ried on pursuant to the rights vested in a person to freely speak his mind. The legislators attacked are elected and enact a measure deemed by X inimical to his interests. Can X sue the legislators on the ground that the bill was passed with the intent and motive of the legislators involved to punish X for having exercised his constitutional right?

The principle involved in this subdivision of our brief and also in our treatment of the subject of immunity of state legislators from civil liability is splendidly expressed in connection with the judiciary by Crompton, J., in the case of *Fray v. Blackburn*, 3 Best & Smith (Q.B.) 576, 577, as follows:

> "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. Therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions."

The above language was quoted with approval in *United States, etc. v. Bell, et al.*, 135 Fed. 336.

The Circuit Court affirmed the principle involved in the case of *Lyons v. Baker, et al.*, 180 F. (2d) 893, an action under the Civil Rights Act. Certiorari denied in the Supreme Court October 9, 1950.

See also, *Bradley v. Fisher*, 80 U.S. 335.

D.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS IMPROPERLY APPLIED THE DOCTRINE OF REPRISAL.

1. Actions claimed to constitute reprisal for having exercised a constitutional right are not actionable under Section 43, Title 8, U.S.C.A.

It is to be observed that we are here concerned not only with the consideration of constitutional rights but also with the construction of a statute.

In 1871 the Congress of the United States passed Section 43, Title 8, U.S.C.A. and at the same session and as part of the statute, passed Section 47, Title 8, U.S.C.A. Both sections are from the Act of April 20, 1871, Chapter 22; Section 43 is subdivision 1 thereof and Section 47 is subdivision 2 thereof. It is to be observed that at the time of passage of Section 43, which gives a cause of action for the deprivation of the rights thereunder secured, there was very clearly in the mind of Congress the subject of a cause of action for reprisal or punishment for having exercised a right secured.

Section 47(1) Title 8 U.S.C.A. shows the presence of the thought in these words:

> "If two or more persons in any state * * * conspire * * * to injure him (any person holding any office, trust or place of confidence under the United States) in his person or property on account of his lawful discharge of the duties of his office * * *"

Section 47(2) Title 8 U.S.C.A. provides:

> "If two or more persons in any state * * * conspire to deter, by force, intimidation or threat,

cont'd on p 57 after p 59-60 INFRA

was deemed to be a federally protected right, action was taken by the defendant which deprived the person of property, namely, the right to hold a public position. Intentionally inflicting loss of employment is punishment. *U. S. v. Lovett*, 328 U.S. 303, at 315.

The Court of Appeals has decided, in effect, that punishment for the exercise of a constitutional right is the equivalent of deprivation of the right. We have heretofore discussed the unsoundness of this interpretation of Section 43. Apart from our claim that the Court of Appeals interpreted Section 43 erroneously, we urge that the facts pleaded and existent clearly disclose that there was no reprisal or punishment inflicted for the exercise of a constitutional right.

Here, the right involved related to circulating a petition among the legislators of the State of California regardless of whether it is regarded as an act of petitioning the legislature for redress of grievances or the exercise of freedom of speech. The next series of acts are all set out in the complaint, and have been referred to from time to time herein fully, and none has the direct effect of punishing nor even the tendency to punish. It will be observed that in *Bomar v. Keyes*, supra, the Court refers to the case of *Douglas v. City of Jeannette*. In that case the Supreme Court of the United States did remit the man to defend his position in the state Court on the assumption that the state Court would properly apply existing laws and that he was protected to the extent that there was no need for a federal Court to issue an injunction to stay

the hand of the state Court. It would be very difficult, and to us, impossible, to find that the act of serving a subpoena lawfully issued under the laws of a state to appear at a hearing could possibly be determined reprisal or punishment. The body holding the hearing did not have the power by judgment or edict nor did it attempt to deprive the respondent of his property or of his liberty.

It must not be overlooked that once the hearing in the Legislative Committee started, the respondent chose under legal advice to be in contempt of the Legislative Committee. No action was taken against him other than to set in motion the orderly processes under the statutory law of California to have determined whether he had committed a misdemeanor by refusing to answer questions. This procedure was initiated by the committee. The full scope of the inquiry initiated permitted a full defense on the part of respondent on the law and on the merits. Wherein does reprisal or punishment flow from these facts?

The action of the committee on the one hand and the respondent on the other, after he was subpoenaed to appear before the committee, became and was a controversy between a citizen of the State of California and an arm of the State Legislature. The Court in its recent case, *Douglas v. City of Jeannette*, supra, declares:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by

> * * * to injure such party or witness in his person or property on account of his having so attended or testified * * * or to injure him or his property for lawfully enforcing or attempting to enforce the right of any person or class of persons * * *"

Section 47(3) Title 8 U.S.C.A. provides:

> "If two or more persons * * * conspire * * * to injure any citizen in person or property on account of such citizen's advocacy * * *"

How simple it would have been for Congress, if it so intended, to have added to Section 43 the words "or to injure any citizen of the United States in his person or property on account of having exercised his rights, privileges or immunities secured by the Constitution". No such language appears in Section 43. Eighty-nine years later a Court of Appeals of the United States reads this language into Section 43. Not only does the decision of the Court of Appeals in this case add a clause to Section 43 which was rejected by the Congress which passed it, but the Court has created an additional class of persons who may be subject to civil liability under the section. The decision of the Court of Appeals in this case is predicated upon the decision in the Second Circuit, *Bomar v. Keyes*, 162 F. (2d) 136. It is interesting to observe that in *Bomar v. Keyes*, supra, the Court of Appeals used the following language:

> "True, the plaintiff did serve upon the jury—literally, she was not 'prevented' from doing so—but it would emasculate the act either to deny

protection against reprisal to those whom threats did not deter, *or to leave without recourse those who were later made the victims of reprisals of which they had not been warned.* Indeed, this is the inevitable implication of Douglas v. Jeannette, in which those aggrieved by prospective prosecution for the exercise of their constitutional privileges, were remitted to their defence, if an attempt should be made to punish them." (Italics added.)

The case cited by the Second Circuit above is *Douglas v. City of Jeannette,* 319 U.S. 157. In that case the Supreme Court did remit the man to defend his position in the state Court on the assumption that the state Court would properly apply existing laws and that he was protected to the extent that there was no need for a Federal Court to issue an injunction to stay the hand of the state Court.

The points raised here were not discussed in *Bomar v. Keyes,* supra, nor by the Court of Appeals for the Ninth Circuit.

2. The acts complained of in the complaint at bar do not constitute reprisal or punishment.

Apart from the legal question of whether there should be read into Section 43 matters omitted therefrom considered by the Congress at the same time and inserted in Section 47, we have here the question of whether reprisal or punishment is pleaded or disclosed in the record. It is to be observed that in *Bomar v. Keyes,* supra, after the exercise of what

cf p 59 supra

federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well-defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved."

Once the committee lawfully assembled to discharge its duty under the resolution creating it, the criticized action of one of its members could not and did not cause the committee to lose its jurisdiction. It would be as though a claim were made that a judge had no jurisdiction to try a person merely because he committed an act of misconduct during the trial.

CONCLUSION.

It is submitted that the decision of the Court of Appeals in this case should not be permitted to stand. Its interpretation of the Civil Rights Act foreshadows the destruction of the legislative processes of the States. It places out of balance the power of the legislature and judiciary by permitting the judiciary to sit in judgment on the motives of legislators in the performance of their duty. It sets at naught the right of the people to have its elected legislators answerable only to them.

The complaint does not state a claim for relief, and we submit that the decision of the District Court should be affirmed.

Dated, San Francisco, California,
February 2, 1951.

Respectfully submitted,

HAROLD C. FAULKNER,

WILBUR F. MATHEWSON,

MELVIN, FAULKNER, SHEEHAN & WISEMAN,

RALPH N. KLEPS,
Legislative Counsel of the State of California,

A. C. MORRISON,
Deputy Legislative Counsel,

EDMUND G. BROWN,
Attorney General of the State of California,

BERT W. LEVIT,
Chief Deputy Attorney General,

Attorneys for the Petitioners.